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MICHAEL RODAK,

SUPREME COURT OF THE UNITED STATES

No. A-1185

WENDEL EVERETT LOWRY and LOWRY INVESTMENTS, INC., a Colorado corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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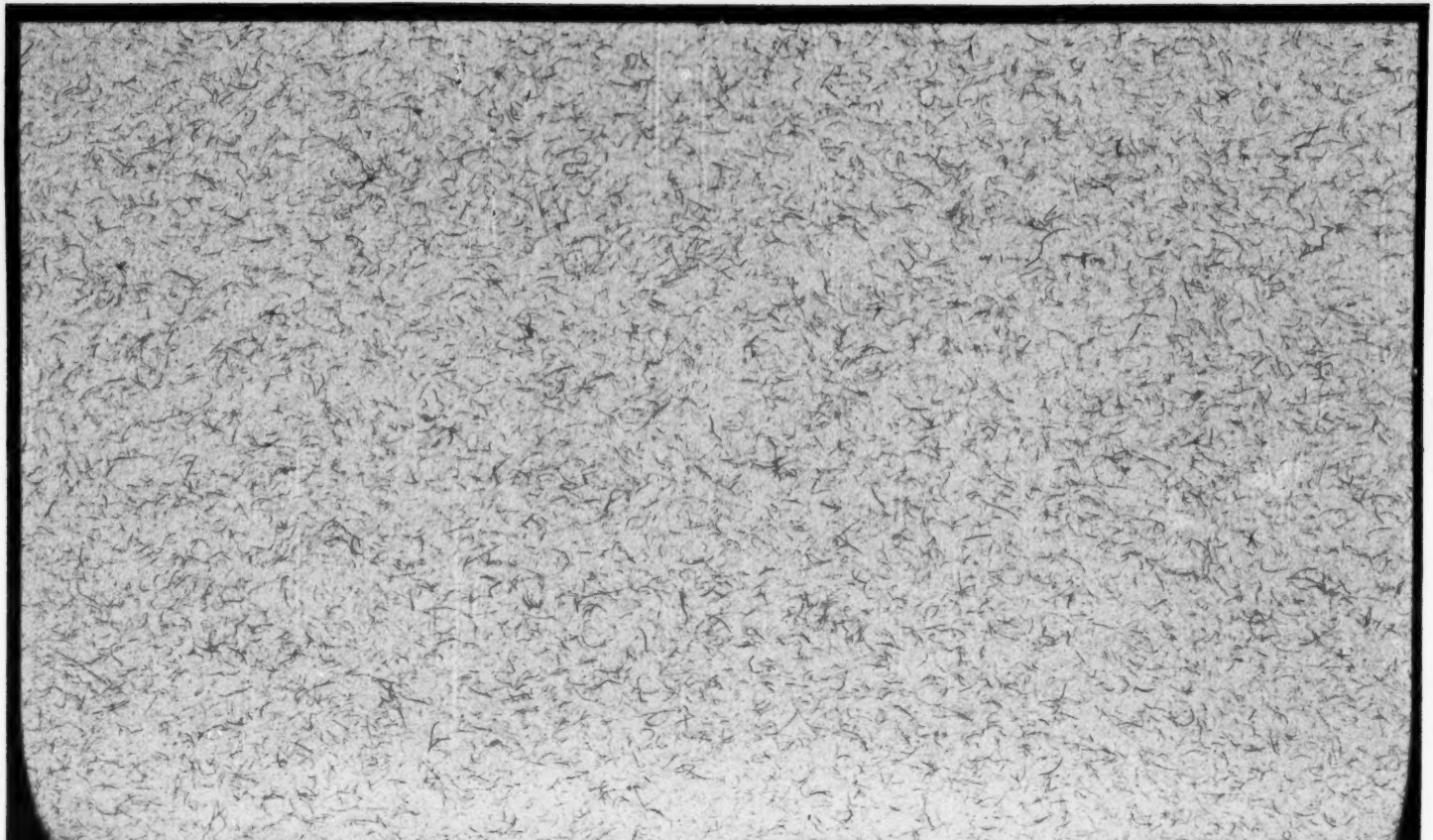

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I.

INTRODUCTION

Petitioners, WENDEL E. LOWRY and LOWRY INVESTMENTS, INC., respectfully move the Court for a Rehearing of the denial of their Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit for the reasons hereinafter set forth.

It is noted that Mr. Justice Douglas was of the opinion that the Petition should have been granted. We submit that on practical grounds, and in the interests of better procedure with the goal of lessening the burden on the lower courts in the federal judicial system, Mr. Justice Douglas' position should be adopted by the full Court and Certiorari granted.

II.

REASONS FOR GRANTING PETITION FOR REHEARING AND GRANTING WRIT

Petitioners' counsel is acutely aware of the deluge of cases flooding this Court. Indeed, it is axiomatic that the Court traditionally is compelled to decline to hear cases that have merit because of the excessive demands made upon the Court by a dynamic society constantly developing new problems, more complex legal situations and questions, new legal areas, as well as the rise in legal business brought about by an expanding population and the concomitant social-legal problems such growth must necessarily entail. Changes in the attitudes toward minority groups of all kinds, school desegregation questions, problems relating to bussing, pornography, redistricting, to mention a few, combine to place what many observers and commentators feel is an intolerable burden upon the Court. The criminal law continues to take up much of the Court's time.

The lower courts are also clogged with legal business, much of it also in the criminal field. The backlog in many Districts is beyond belief. It is commonplace for trial Judges to point out that they are so deluged with criminal prosecutions, habeas corpus applications, and Section 2255 proceedings, as well as cases being brought up from the State Courts, that they find it almost impossible to take care of civil litigation. As the Court well knows, this situation has led to suggestions which would lead to eliminating diversity of citizenship cases from the jurisdiction of the federal courts. Therefore, it is submitted that the Court should always be alert to take cases that by their nature will enable the Court, either by plain decision, or by the exercise of its rule making and super-

visory powers, to render much needed assistance to lower federal courts. Such help is vital before the federal system collapses under the sheer weight of the numbers of criminal matters it now must entertain.

The subject matter of this case ultimately relates to the day to day business and practice of the federal district courts. Not only are the constitutional rights of the individuals of concern here, but whether the courts can continue to efficiently dispense justice, and whether they in fact are able to do so.

It has long been the practice of District Attorneys to add a conspiracy count as the last count in an indictment which charges one or more substantive offenses. This routine charge ultimately results in a more liberal reception of evidence, and as a matter of being practical, in hearsay evidence going in which could never be admitted absent the conspiracy charge. The receiving of hearsay evidence, beyond that allowable without the conspiracy charge, or in a civil case for that matter, has been so rampant that a prosecutor would be remiss in his duties if he failed to include a conspiracy count in most indictments. The presently accepted doctrine that the prosecution must make its own case becomes a farce when the posture of the case is developed by the liberal use of conspiracy type hearsay evidence. Once the case is completed it often becomes immaterial if the prosecutor dismisses the conspiracy count at the conclusion of his case in chief, or when all of the evidence is in. The defense is without any means to effectively resist such evidence, and once in, no matter what happens to the conspiracy count, such evidence will have a marked effect on the outcome of the case. Warning instructions given by the court are almost always of no avail.

In the case at bar, although the very nature of the basic charges, a scheme to use the mails to defraud in the sale of securities, would allow the use of conspiracy type hearsay evidence, the Government nevertheless added a seventh count charging a conspiracy to use the mails to defraud. This meant the use of hearsay evidence to prove conspiracy to enter into a scheme which also allows liberal use of hearsay evidence. This type of pleading can only be described as "piggy-back" pleading, the use of hearsay evidence on hearsay evidence. Even the trial court objected to this and persuaded the Government to dismiss Count Seven before trial. This sort of thing should not be tolerated. It should be the obligation of this Court, rather than the district courts, to put an end to such practice by the exercise of its rule making powers as suggested in these Petitioners' Petition for Writ of Certiorari.

Discouraging the use of conspiracy counts in cases where there are substantive counts would do a great deal to assist the lower courts, would restore the rules of evidence relating to hearsay to a consistent pattern not entirely dependent upon the whims of various trial courts, and would encourage government prosecutors to try substantive counts on their merits, or if the case is weak, not at all.

Keeping this discussion on a practical level, in a case arising in the District of Kansas, now on appeal to the Court of Appeals for the Tenth Circuit (United States vs. Tager, No.), the defendant was charged in a separate indictment with conspiring to impede and obstruct the Government in the collection of taxes. No substantive charge was made. The defendant never knew exactly what he was charged with, except a conspiracy under 18 U.S.C. Sec. 371. That meant the receiving into evidence of hearsay evidence from an alleged co-con-

spirator who was not even indicted. The next step, in what became a legal charade, was as follows: A motion was made by the Government to consolidate the pure conspiracy charge with another indictment which charged two counts of income tax evasion—not related to the conspiracy charge, and both weak on evidence. Not only that, but to get around the statute of limitations, the conspiracy indictment simply added two conversations with Internal Revenue Service agents within the period of limitations. The evidence on the conspiracy charge was, of course, far reaching and decidedly hearsay. The conspiracy evidence was so all-encompassing that it had to have an effect on the first indictment, and did. Conviction followed on both, although the evidence on the conspiracy charge took 80% of the trial time, much of it hearsay and indefensible. Not only that, but the attorney for the Justice Department made it known that if this particular conspiracy charge "stuck" there would be more cases like it filed by the Justice Department.

It is submitted that as a prosecution tool the conspiracy charge will have more and varied uses depending upon the ingenuity of the prosecution. To conclude, the conspiracy charge, and the related concept of the scheme, have played havoc with the ordinary rules of evidence, the rights of the accused, and trial time of the lower courts. This prosecution-oriented concept must be controlled, otherwise the situation can only become worse as is amply demonstrated by the Tager case.

Individual members of this Court have deplored the conspiracy charge; the lower courts and this writer's brethren at the bar are all familiar with the problem and have also deplored it. The help of the Court is urged in the interest of uniformity, control and justice.

III.

CONCLUSION

It is respectfully requested that the Court reverse its order denying these Petitioners' Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit and enter an order granting such Petition.

Respectfully submitted,

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Estes Park, Colorado 80517
Attorney for Petitioners

CERTIFICATE

The undersigned, counsel for Petitioners herein, hereby certifies that this Petition for Rehearing is presented in good faith and not for purposes of delay. Counsel further certifies that the Petition is restricted to substantial grounds available to Petitioners, but not previously presented, to-wit: The practical aspect and impact of the denial upon the lower Courts, prosecuting attorneys, and the administration of criminal justice.

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